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OF COUNSEL:
GEORGE L. VARNADOE

March 2, 2020

Ms. Ava DuVernay
c/o Ms. Nina Shaw
Del, Shaw, Moonves, Tanaka, Finkelstein & Lezcano
2029 Century Park East, Suite 1750
Los Angeles, CA 90067

VIA FEDERAL EXPRESS

**Re: *When They See Us*/ Linda Fairstein
Pre-Suit Notice Pursuant to Sections 770.01 and 770.02,
Florida Statutes**

Dear Ms. DuVernay:

Please be advised that the undersigned represent Linda Fairstein with respect to the pursuit of defamation claims against you, Netflix, Inc., and Attica Locke for the false and defamatory portrayal of Ms. Fairstein in *When They See Us*. We write in accordance with Section 770.01, Florida Statutes, to notify you¹ that Ms. Fairstein intends to initiate litigation against you with respect to 3 of the 4 episodes that comprise *When They See Us* and in which Ms. Fairstein is portrayed, in her own name, by actress Felicity Huffman. We also write, in accordance with Section 770.02, Florida Statutes, to demand on behalf of Ms. Fairstein a "full and fair correction, apology, or retraction."

On May 31, 2019, Netflix aired *When They See Us* on its streaming platform, which you, Netflix and Ms. Locke marketed and promoted as a true story. *When They See Us* purports to portray the detention, arrests, trials and convictions of five young men of color—Kharey (aka Korey) Wise ("Mr. Wise"), Raymond Santana ("Mr. Santana"), Kevin Richardson ("Mr. Richardson"), Yusef Salaam ("Mr. Salaam") and Antron McCray ("Mr. McCray") (collectively "The Five")—who were accused of beating and raping a female jogger, in addition to rioting and attacking a number of other victims, in New York City's Central Park in April 1989. The convictions were later vacated based on the confession of, and DNA evidence from, Matias Reyes, who came forward in 2002. The men subsequently sued New York City, New York District Attorney Robert Morgenthau, three prosecutors (including Ms. Fairstein), and scores of NYPD officers and detectives. The lawsuit was settled in 2014.

¹ It is debatable whether you are entitled to pre-suit notice under the Florida Statutes and, accordingly, Ms. Fairstein reserves all rights in this regard.

EXHIBIT 2

Ms. Ava DuVernay
 March 2, 2020
 Page 2

Ms. Fairstein was the head of the Manhattan District Attorney's Sex Crimes Unit in April 1989, but she *did not* personally prosecute the case. Despite her lack of involvement in the case against The Five, *When They See Us* falsely portrays Ms. Fairstein as the villainous mastermind behind a racist plot to coerce confessions from, prosecute, and convict The Five without sufficient credible evidence. Throughout the film series, Ms. Fairstein is also portrayed as routinely engaging in unlawful and unethical activities. Nearly every scene in which Ms. Fairstein appears in the film series is a complete fabrication, depicting Ms. Fairstein in places where she never was, making decisions she never made, and putting words in her mouth—that are outrageously offensive—that she never uttered. Examples of the false and defamatory scenes that appear in *When They See Us* are as follows:

Part One (Episode 1)

1. Ms. Fairstein is depicted at the Central Park jogger crime scene on the morning of April 20, 1989, overseeing the crime scene investigation and announcing the theory that a single perpetrator was involved in the attack on the female jogger. *See* Part One, at 7:30-8:50.²
2. Ms. Fairstein is pictured arriving at the New York City Police Department's 24th Precinct on the morning of April 20, 1989 and immediately drafting a press release to give to reporters waiting outside the Precinct, which incorporates details that she learned from the crime scene. *Id.* at 8:50-9:19.
3. Ms. Fairstein is next depicted asking out loud about the term, “wiling” or “wilding.” Immediately after, she is seen walking past a 24th Precinct banner in a building lobby, past Mr. Santana's grandmother and father, asking for Detective Farrell. This scene is set at 8:00 a.m. on April 20, 1989. NYPD Officer Eric Reynolds is also in this scene, speaking with Mr. Santana's father. Ms. Fairstein then proceeds to a room in the 24th Precinct where she begins questioning young men of color, ages 13 and 14, without reading them their *Miranda* rights, and in violation of New York State law which prohibited the questioning of minors under age 16 without a parent present. Ms. Fairstein asks a young man if he saw bad people doing bad things in the park. The young man responds that he was with his “boy Tron.” Ms. Fairstein then asks if the young man was “wilding with Tron,” (Antron McCray), and asks for McCray's address. The young man responds that Tron lives at Schomberg. *Id.* at 9:46-12:38.
4. In the same scene, Ms. Fairstein berates Detective Farrell for almost letting the young men, whom she describes as witnesses to a rape, go on a family court ticket. She then demands the immediate completion of interviews with the unaccompanied minors so

² This form of citation references the time stamp of each scene in a given episode as indicated when viewing the episode.

Ms. Ava DuVernay
March 2, 2020
Page 3

that she can put together a timeline, stating “[w]e’ve got a lady raped and clinging to life here.” *Id.* at 12:39-13:03.

5. Next, Ms. Fairstein is seen sitting at a desk on the same day, April 20th, reviewing paperwork and placing Post-It notes on a map of Central Park. Detective Sheehan enters the room and Ms. Fairstein says, “Farrell’s interviews with the boys are in, all of this is happening in the Park and they’re not connected?” This shows viewers that Detective Farrell complied with Ms. Fairstein’s directive to rush the interviews so she could put together a timeline to connect the rape to the other assaults that happened in Central Park on the night of April 19, 1989. Ms. Fairstein then places a Post-It on the map that says “RAPE” and declares to Detective Sheehan, “they’re not witnesses, they’re suspects.” *Id.* at 15:58-16:52.
6. In a later scene, Ms. Fairstein is seen in front of a large map plotting the female jogger’s path and disregarding discrepancies in the timeline, pointed out by a detective, to pin the rape of the Central Park jogger on the young men in custody. *Id.* at 34:45-36:24.
7. Ms. Fairstein is further portrayed as fighting Assistant District Attorney Nancy Ryan for control of the case against The Five while on a conference call with DA Morgenthau. During that call, ADA Ryan says that Homicide has been handling the case and she was at the crime scene before daylight, to which Ms. Fairstein replies, “Well I got there before you. I have had precinct guys interviewing suspects.” ADA Ryan incredulously says “suspects? A dozen kids harassing bicyclists.” Ms. Fairstein responds, “these kids were on a rampage.” She then goes on to say there were “3,412 rapes reported to the NYPD last year. 3,412 times someone was assaulted, threatened, degraded, forced. This as an epidemic, we are not in control and we can be.” *Id.* at 16:53-18:41.
8. In the next scene, Ms. Fairstein is seen briefing NYPD police and detectives in front of a map with ADA Ryan present. Ms. Fairstein says, “they brutally raped a woman and discarded her like a piece of garbage, left her for dead, bleeding, bound, naked. And to think we were going to release these animals to family court and put them back on the streets.” Ms. Fairstein then notes a missing half-hour in the timeline, asking “what did these animals do between here and here (pointing to map)? Are there other victims still in the Park?” ADA Ryan then approaches Ms. Fairstein and says, “Good luck, you’re gonna need it.” *Id.* at 18:42-19:53.
9. In the next scene, Ms. Fairstein is portrayed as calling for a roundup of young, black males in Harlem:

Ms. Ava DuVernay
March 2, 2020
Page 4

I need that whole group.... I need all of them. Every young black male who was in the park last night is a suspect in the rape of that woman who is fighting for her life right now. I want units out strong. Come on, guys. What did we miss? Let's get an army of blue up in Harlem. You go into those projects and you stop every little thug you see. You bring in every kid who was in the park last night.³ *Id.* at 19:54-20:30.

10. In the next scene, Ms. Fairstein is directing NYPD officers who are about to interview Mr. Richardson:

We've got suspects, we've got kids in custody. Interrogate. Make them name their accomplices. This is not business as usual. The press is crawling all over this. No kid gloves here. These are not kids. They raped this woman. Our lady jogger deserves this. *Id.* at 22:35-22:53.

The next image is of Mr. Richardson in an interrogation room, with a black eye, handcuffed to a chair. Part One, 22:54-24:17.

11. The next scene shows Ms. Fairstein approaching Assistant District Attorney Elizabeth Lederer in a library, telling Lederer that she was up all night working on the case. ADA Lederer points out that the facts provided in the witness statements align with each other except "when we arrive at the rape," to which Ms. Fairstein interrupts, "they all start lying." ADA Lederer says that there are a number of different versions of what occurred with respect to the rape and confronts Ms. Fairstein, stating "I've got to face a judge and prosecute this, Linda...what is your case?" Ms. Fairstein responds that "they're all guilty, each of these boys assaulted Patricia Meili, they all raped her and we know this because in each of these boys' confessions, they all bear eyewitness against each other." ADA Lederer then says, "I'm imagining myself walking into that courtroom, armed with a stack of wildly conflicting statements, no physical evidence, no weapon." To which Ms. Fairstein replies, "All we need is for one of these little shits to tie this whole thing together." *Id.* at 47:42-49:28.
12. Ms. Fairstein, Detective Sheehan and ADA Lederer are next seen viewing Antron McCray's videotaped statement. ADA Lederer says to Ms. Fairstein, "[t]his kid is a dumpster fire, he says he didn't rape her, he says he didn't actually witness it, you've lost Yusef and Antron and you don't have a location." The next scene shows Detective Sheehan feeding information to Kevin Richardson. *Id.* at 49:30-50:13.
13. ADA Lederer next tells Ms. Fairstein, "the biggest issue isn't that their statements don't match, it's that nothing these boys state matches the central facts of the

³ This scene is also prominently featured in the trailer for *When They See Us*, released on April 19, 2019.

Ms. Ava DuVernay
March 2, 2020
Page 5

crime.” Detective Sheehan is then shown telling Mr. Santana how to change his statement. *Id.* at 49:59-50:29.

14. ADA Lederer next tells Ms. Fairstein, “Meili was found raped and beaten in an area a half a mile north of the reservoir, all of them say the attack happened beside the reservoir. So, did they rape her there and then drag her a half mile? Where is the physical evidence to support that?” *Id.* at 50:30-50:49.
15. Next, Ms. Fairstein and ADA Lederer are seen speaking with Detective Sheehan. Ms. Fairstein asks, “We still got one more, right?” to which Sheehan responds, “Korey Wise.” Ms. Fairstein says, “he’s the one, he’s the glue, we’ll make sure he sticks it together.” ADA Lederer says, “Well make sure this kid knows where he actually was.” *Id.* at 50:46-51:01. Within approximately one minute of the false depiction of Ms. Fairstein referring to Mr. Wise as “the glue” to hold her theory together, Mr. Wise is shown being physically beaten by detectives before he gives a statement. *Id.* at 52:25.

Part Two (Episode 2)

1. Ms. Fairstein is seen discussing the case against The Five with ADA Lederer and DA Morgenthau. DA Morgenthau says, “We have useless tape, we lost our gang narrative, we can’t find DNA.” Ms. Fairstein replies, “We have a sock, those little bastards shot their wad into a sock thinking we wouldn’t find it, but we found it.” Morgenthau then says, “We have DNA, good. The match will nail this thing down.” ADA Lederer says, “How did the NYPD miss this?” To which Ms. Fairstein says, “Who cares? We have it now and the kicker is none of the defense is aware yet so we can test it right before the trial-surprise!” ADA Lederer, looking upset, says, “Surprise.” Part Two, at 16:39-17:14.
2. In a later scene, ADA Lederer and Ms. Fairstein learn that the sock DNA is not a match to any of the defendants. ADA Lederer says, “I needed this DNA in the sock to nail all this down—it doesn’t match. The five defendants are clean.” Ms. Fairstein responds, “So there must have been another attacker? One must have gotten away.” ADA Lederer replies, “You honestly believe that?” to which Ms. Fairstein responds, “I do if it helps a jury believe what we know is true.” *Id.* at 29:41-31:23.
3. ADA Lederer then asks, “Do you know what is happening here?” Ms. Fairstein replies, “We have still got the cervical DNA,” to which ADA Lederer responds, “which was inconclusive.” Ms. Fairstein then says, “it means the five can’t be ruled out. Deal with the sock DNA, play up the cervical DNA.” ADA Lederer then asks, “Are you listening to yourself? You sound delusional. You want me to pretend that the sock never existed, this is crossing a line.” Ms. Fairstein responds, “What line,

Ms. Ava DuVernay
March 2, 2020
Page 6

Elizabeth? Where's the line for Patricia? I'm sick of this shit. Where's the line for her?... Fucking City, we hear something gruesome, we grimace and we move on. Well not this time." *Id.*

4. ADA Lederer then says, "But these boys Linda..." Ms. Fairstein responds, "They were in the park beating people up the same night that she's getting beat up and you're telling me they had nothing to do with it? Bullshit. They said it themselves, they told us what happened." ADA Lederer then stresses, "They were told," to which Ms. Fairstein says, "C'mon, the eye sees but it cannot see itself, they couldn't see the whole picture of how their one part fit into the whole, that is all we did. It's too late for this. Like you said, the whole country is watching. They are watching you. This is your opportunity. Remember her." *Id.* at 31:24-32:23.

Part Four (Episode 4)

1. Assistant District Attorney Peter Casolaro is seen reading from a file to ADA Ryan, saying, "Fairstein acknowledged the track marks... 'this is where he pulled her in.'" He asks ADA Ryan, "When did the theory change?" To which ADA Ryan responds, "I was there when it changed." Part Four, at 1:04:11-1:04:35.
2. In a later, and final, scene concerning Ms. Fairstein, ADA Ryan meets Ms. Fairstein in a restaurant. Ms. Fairstein tells ADA Ryan, "You're here to gloat. It doesn't matter, you simply identified a sixth rapist, I always said there may be more." ADA Ryan responds, "You said that to cover because you knew you coerced those boys into saying what they did Linda, we pored over your confession tapes." Ryan then puts several of Ms. Fairstein's novels on the table, noting that while Ms. Fairstein was writing crime novels, five innocent young men were serving time. Part Four, at 1:09:49-1:12:43.

None of the scenes outlined above, in which Ms. Fairstein appears, can be explained or justified as factually portraying The Five's account of what happened. Each of the scenes is a complete fabrication, readily contradicted by publicly-available evidence, including hearing and trial transcripts, sworn testimony in the original proceedings against The Five, and depositions taken during their subsequent lawsuit. This evidence was not only in possession of The Five, or their attorneys, but was made publicly available on the New York City Law Department website dedicated to the case. The website was published prior to the date on which the release of *When They See Us*. See (<http://www.nyc-cpj.org/Home/Disclaimer>).

By letter dated June 9, 2016, addressed to your attention, Ms. Fairstein notified you of her concern that "based on past, unfair treatment...in the media in connection with the Central Park jogger case [she was]...justifiably concerned that your project might also fail to portray

Ms. Ava DuVernay
March 2, 2020
Page 7

[her] accurately and fairly.” The letter further identified: 1) the erroneous or misleading impressions and factual assertions which have been in the public domain; 2) unreliable and biased sources of information which should not be relied upon; and 3) a non-exhaustive list of over twenty (20) sources, including the transcripts and testimony that flatly contradict the scenes outlined above.

You have publicly stated that *When They See Us* is based on your review of all of the court transcripts, public records and files relating to the case against The Five.⁴ You have also stated that Ms. Attica Locke “delves deep into the court transcripts, testimony, legal maneuvers” and “had the patience” to “explain it” to you to “build the suspense.”⁵ Both before, and after, the premiere of *When They See Us*, you promoted the film series on social media as the “real story,” and “the truth.”⁶ You also stated on Twitter that “the arc of the Fairstein/Ryan relationship is real. Fairstein really battled Ryan for the case in 1989.”⁷ As discussed above your portrayal of Ms. Ryan and Ms. Fairstein in Part One (Episode One) is false, as are the scenes which appear in Part Four (Episode Four).

In an interview with Oprah Winfrey, which aired on Netflix on June 12, 2019, you were asked about Ms. Fairstein’s resignation from board positions, stepping down from charities, and being dropped by her publisher after the premiere of *When They See Us*. You responded “I think it’s important that people be held accountable. And that accountability is happening in a way today that it did not happen for the real men 30 years ago. But I think it would be a tragedy if this story and the telling of it...came down to one woman being punished for what she did. And so the goal of this—okay, Linda Fairstein...all of these people need to be held accountable....” On the same day, you posted a tweet which stated:

not a single publication needs to give Linda Fairstein a chance to speak. These men are broken because of her actions. She has done more than enough damage.
#WhenTheySeeUsNow⁸

In an apparent effort to create a more damaging narrative about Ms. Fairstein’s character, and further harm her reputation, you also made false public statements concerning Ms. Fairstein’s alleged unwillingness to participate in the filmmaking process. Specifically, in a panel discussion with Jane Rosenthal you confirmed Ms. Rosenthal’s false assertion that Ms. Fairstein did not want you, or Ms. Rosenthal, speaking with The Five if you were also speaking with Ms.

⁴ See, e.g. <https://www.rollingstone.com/tv/tv-features/when-they-see-us-netflix-central-park-five-ava-duvernay-interview-841081/>

⁵ <https://twitter.com/ava/status/1134866046618202112>

⁶ See <https://www.instagram.com/p/BwcZkrOF4xY/> and <https://twitter.com/ava/status/1132118462162063361> and <https://twitter.com/ava/status/1134354271980232704>.

⁷ <https://twitter.com/ava/status/1135331321952104448?lang=en>

⁸ <https://twitter.com/ava/status/1139009911788937216>

Ms. Ava DuVernay
March 2, 2020
Page 8

Fairstein.⁹ In an interview published in *The Daily Beast* and other publications, you falsely stated that Ms. Fairstein demanded script approval rights in exchange for speaking with you.¹⁰

Given the sheer volume of facts in the public record which contradict the manner in which you portrayed Ms. Fairstein in *When They See Us*—about which you had advance notice from Ms. Fairstein—your marketing and promotion of the film series as a truthful account of what happened was intended to mislead viewers into thinking that the film series’ false portrayal of Ms. Fairstein is accurate. This is apparent in the public’s outcry against Ms. Fairstein immediately following the May 31, 2019 premiere of the film series, which you attributed to the film series finally holding her accountable.

Your portrayal of Ms. Fairstein as engaging in unlawful and unethical conduct motivated by racism against The Five is simply unsupported by any evidence. When marketing and promoting *When They See Us* at the time of the film series premiere and thereafter, you knew that the portrayal of Ms. Fairstein in the scenes outlined above was false. At a minimum, you acted in reckless disregard of the falsity of the manner in which Ms. Fairstein was portrayed in the film series, despite being placed on notice by Ms. Fairstein. In light of the public record, you must have entertained serious doubts about the truth of the manner in which Ms. Fairstein was portrayed in *When They See Us*. As a result of you engaging Netflix to publish *When They See Us*, which continues to stream on its platform, you defamed Ms. Fairstein. To the extent that you have engaged other parties to broadcast *When They See Us*, you have also defamed Ms. Fairstein.

While you have profited immensely from *When They See Us*, Ms. Fairstein’s reputation has been decimated as a direct result of your film, and she has faced death threats and threats of physical harm. Ms. Fairstein’s career as a prolific, award-winning, published author has come to an end, and her private practice as an attorney has also been severely impacted.

In accordance with Section 770.02, Florida Statutes, we demand, on behalf of Ms. Fairstein, that you issue a “full and fair correction, apology, or retraction,” as outlined below. While this will not eliminate the damages that Ms. Fairstein has already suffered, and which she will be entitled to recover, it may mitigate further harm to Ms. Fairstein. We hereby demand that you:

1. Issue a public statement correcting the false and defamatory scenes concerning Ms. Fairstein that appear in *When They See Us*, as detailed *supra*, and which states that the series, and the scenes, are a “fictionalized dramatization, comprised of scenes and dialogue that never happened and were never spoken, a product of the writers’ fertile imagination and desire to create a fictional villain in Ms. Fairstein for the public to hate who never existed in reality.”

⁹ <https://variety.com/2019/tv/news/central-park-five-prosecutor-linda-fairstein-wouldnt-consult-netflix-1203237218/>

¹⁰ <https://www.thedailybeast.com/netflixs-when-they-see-us-ava-duvernay-on-central-park-five-case-and-why-she-treated-trump-as-a-footnote>

Ms. Ava DuVernay
March 2, 2020
Page 9

2. Remove the posts from your social media accounts which are located at the following url's:

<https://www.instagram.com/p/BwcZkrOF4xY/>
<https://twitter.com/ava/status/1129629307771314176>
<https://twitter.com/ava/status/1132118462162063361>
<https://twitter.com/ava/status/1134354271980232704>
<https://twitter.com/ava/status/1135331321952104448?lang=en>
<https://twitter.com/ava/status/1139009911788937216>

3. Remove all other posts from your social media accounts which refer to *When They See Us* as a real, true or fact-based story.
4. Remove all other posts from your social media accounts which refer to Ms. Fairstein as responsible for the prosecution of the Central Park jogger case.
5. Direct Netflix to remove Parts One, Two and Four of *When They See Us* from its streaming platform, and from any other platform, service or other medium that Netflix controls through which the film series is, or will be, viewed.
6. Direct any parties other than Netflix, through which *When They See Us* has been, or will be viewed, not to broadcast the film series.
7. Edit Parts One, Two and Four of *When They See Us* so that the false and defamatory scenes depicting Ms. Fairstein, detailed *supra*, are removed.
8. Place a prominent disclaimer at the beginning of each episode which states that the series is a dramatization, is not a true story, and that the characters identified by their actual names in the film series are not truthfully depicted.

We also demand that you preserve all evidence within your possession, custody and control relating to Ms. Fairstein and *When They See Us*, including, but not limited to, draft and final scripts, treatments, teleplays, marketing and promotional materials, unedited cuts of the film series, outtakes, social media plans, social media posts, documents, communications, and electronically stored information such as emails, messaging applications, text messages and voicemails. The terms “documents” and “communications” should be read in the broadest possible sense. Please be further advised, that any alteration, loss, spoliation, or destruction of any such documents, whether electronic, digital, or in hard copy, may subject you to sanctions in any ensuing legal proceeding.

Ms. Ava DuVernay
March 2, 2020
Page 10


Please be advised that this communication is without prejudice to, and shall not affect in any manner, the rights, claims, remedies, actions or causes of action which Ms. Fairstein has, or may have, against you, at law, in equity, or otherwise.

All communications concerning this correspondence should be directed to Andrew T. Miltenberg, at 212-736-4500, **prior to March 9, 2020**, if you would like to discuss this matter prior to the commencement of litigation.

Sincerely,


Edward K. Cheffy

-and-


Andrew T. Miltenberg
Nesenoff & Miltenberg, LLP
363 Seventh Avenue, 5th Floor
New York, New York 10001

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